

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SABA FATTALEH,

Plaintiff and Appellant,

v.

COUNTY OF ORANGE,

Defendant and Respondent.

G051931

(Super. Ct. No. 30-2013-00628070)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John C. Gastelum, Judge. Affirmed.

Felahy Law Group and Allen B. Felahy for Plaintiff and Appellant.

Sullivan, Ballog & Williams, Daniel R. Sullivan, Brian L. Williams, Michael S. Vasin and Michelle N. Vo for Defendant and Respondent.

*

*

*

Defendant and respondent County of Orange (County) has employed plaintiff and appellant Saba Fattaleh as a food inspector for more than 20 years. During Fattaleh's employment, the County received many complaints from the operators of facilities he inspected about his conduct and interaction with people. In recent years, the County conducted three investigatory hearings into complaints about Fattaleh and his conduct. Following the first two hearings, the County issued "memoranda of expectations" explaining how Fattaleh's conduct failed to comply with the County's policies and standards and how he should conduct himself in the future. The County did not formally reprimand or punish Fattaleh. Following the third hearing, however, the County formally reprimanded Fattaleh and warned him it could suspend or terminate his employment if he did not improve his behavior, and recommended his transfer to another inspection district to avoid interacting with a particular operator who lodged numerous complaints against Fattaleh.

Fattaleh's hearing and reprimand occurred shortly after he filed both a complaint with the California Department of Fair Employment and Housing (DFEH) and this lawsuit accusing the County of discriminating against him based on his "Palestinian Arab ancestry," creating a hostile work environment, and retaliation. Fattaleh later amended his pleading to assert a retaliation claim that alleged the County reprimanded him in retaliation for filing his DFEH complaint and this lawsuit. The County moved for summary judgment on all of Fattaleh's claims and the trial court granted the motion. On the retaliation claim, the court concluded the County established a legitimate, nonretaliatory reason for reprimanding Fattaleh—namely, the history of complaints against him—and Fattaleh failed to present evidence establishing a triable issue of fact on whether the County's stated reason for reprimanding him was a pretext for retaliation. On this appeal, Fattaleh does not challenge the court's ruling on any claim other than the retaliation claim.

We affirm. The County presented ample evidence showing facility operators and others lodged numerous complaints about Fattaleh's conduct, the County's investigation of those complaints, and the County's graduated response. To create a triable issue of fact, Fattaleh must point to evidence supporting a reasonable inference not only that the County's stated reasons for reprimanding Fattaleh were unworthy of credence, but also the true reason for the County's actions was unlawful retaliation. As more fully explained below, Fattaleh points to nothing other than temporal proximity between his protected activity and the County's reprimand, but it is well established that temporal proximity alone is not sufficient to create a triable issue on pretext.

I

FACTS AND PROCEDURAL HISTORY

Fattaleh is a Palestinian Arab born in Amman, Jordan. In 1993, the County hired Fattaleh as an Environmental Health Specialist I in the retail food and public pool section of the County's Environmental Health Department. His job duties included inspecting restaurants, food facilities, and public pools, and also investigating complaints about those facilities. By 2006, Fattaleh reached the highest pay grade or step for the Environmental Health Specialist I position. He interviewed for a promotion to Environmental Health Specialist II on 17 or 18 occasions, but the County never selected him for the position. For the past several years, Fattaleh has been assigned to conduct inspections in District 401, which consists primarily of the City of Los Alamitos and also includes portions of the Cities of Cypress and Westminster.

Throughout his employment, Fattaleh believes the County subjected him to systematic discrimination based on his Palestinian Arab ancestry. In June 2006, he sent the County a memorandum reporting every instance in which he believed someone subjected him to racial discrimination or retaliation or otherwise created a hostile work environment for him. After conducting an investigation, the County found no evidence

to substantiate Fattaleh's complaints, but it found he had been subjected to sporadic, inappropriate comments that did not violate the law. To address those comments, the County conducted mandatory training for all employees.

Fattaleh has a history of complaints about his interaction with the public and his inspection of facilities. Based on these complaints, the County conducted three separate investigatory hearings into Fattaleh's conduct. The first investigation arose from Fattaleh's 2007 inspection of a Huntington Beach food facility. He found food defrosting on the counter, a potential major violation, and discussed the matter with the facility's manager and asked to speak with the cook. According to Fattaleh, the manager became aggressive and hostile as she yelled in his face. Fattaleh tried to calm the manager as he spoke with the cook and determined no major violation had occurred. The manager, however, would not calm down and continued to be very hostile and aggressive. Fattaleh grew uncomfortable with the manager's behavior and excused himself without completing the inspection.

Fattaleh immediately reported the incident to his supervisor, who instructed Fattaleh to prepare a written report describing the encounter. When Fattaleh's supervisor spoke with the facility's manager, she asserted Fattaleh had been the person who was aggressive and hostile. Fattaleh's supervisor informed the manager she could lodge a complaint with the County's human resources department. The manager lodged a complaint against Fattaleh and the County conducted an investigatory hearing to determine what occurred. None of the parties specify the County's findings, but they agree the County did not formally reprimand Fattaleh or take any adverse action against him. Instead, the County merely sent Fattaleh a memorandum instructing him to conduct himself in a professional and appropriate manner when interacting with the public and facility operators.

The County's next investigatory hearing arose out of two separate incidents in the fall of 2011. First, Fattaleh was inspecting food truck permits at a city sponsored

event in Los Alamitos when he noticed a church across the street also was selling food as part of the event. Fattaleh located the church organizer to determine whether the church had obtained a permit. The organizer explained she had spoken with Fattaleh's supervisor about the event, but did not have a permit. Fattaleh contacted his supervisor, who told him not to shut down the event but to advise the organizer to obtain a permit before conducting any future food sales. Fattaleh did so and wrote a report of the incident as his supervisor instructed.

As Fattaleh was writing his report, a member of the Los Alamitos City Council approached him and demanded to know what he was doing. He explained he was a food inspector in attendance because the city had designated it as a community event that required an inspection. He assured the councilwoman he was not there to shut down the event, but she demanded to know which city employees she could speak to about his inspection. Fattaleh responded he earlier had seen the city manager, Steven Mendoza, and the councilwoman said she would speak to Mendoza about the event. Both the city councilwoman and the city manager later complained to Fattaleh's supervisor about his behavior.

A few weeks later, Fattaleh conducted a routine inspection at a Costa Mesa Starbucks store without reviewing the current list of potentially hazardous foods. During the inspection, Fattaleh demanded the store manager provide documentation showing why a particular cheese Danish did not require refrigeration, and the store manager explained the Danish was not on the list of potentially hazardous foods requiring refrigeration. Following this inspection, a Starbucks regional manager complained to Fattaleh's supervisor and requested that Fattaleh not conduct future inspections at any Starbucks store.

The County conducted another investigatory hearing to evaluate Fattaleh's conduct on these two occasions. The County found Fattaleh's interaction with the public and facility operators had been an ongoing problem for several years and the County had

received more complaints about Fattaleh's conduct than any other inspector, including five separate facilities that requested he no longer conduct their inspections. Nonetheless, the County again did not formally reprimand Fattaleh or take any adverse action against him. Instead, in December 2011, the County sent Fattaleh a "memorandum of expectations" listing the many complaints it had received about him, describing the deficiencies in his performance, and explaining how the County expected Fattaleh to conduct himself in the future.

The third investigatory hearing arose out of Fattaleh's December 2012 visit to the Los Alamitos City Hall. As part of his job duties, Fattaleh regularly visited city hall to answer questions and coordinate inspections. During this visit, Fattaleh ran into Mendoza, the city manager who previously had complained about him. Fattaleh attempted to engage Mendoza in a good-natured, casual conversation to build a rapport with him, but the encounter became antagonistic when Mendoza objected to Fattaleh's joke about Mendoza not wearing a tie. Fattaleh apologized and the conversation quickly ended when Mendoza returned to his office. Fattaleh remained in the public area of the city hall and struck up a conversation with the city receptionist and a building inspector about the upcoming holidays. He spoke and laughed with the city employees for a few minutes until Mendoza returned and asked Fattaleh to leave. Following Mendoza's instructions, Fattaleh wished everyone happy holidays and left city hall. He immediately contacted his supervisor to explain what had happened and his supervisor instructed Fattaleh to send her an e-mail describing the foregoing events.

About a week later, Fattaleh told his supervisor he did not want to make his regular visit to the Los Alamitos City Hall because Mendoza apparently held a grudge against him. Fattaleh's supervisor agreed it was not a good idea for Fattaleh to return to city hall until the supervisor had an opportunity to speak with management about the situation. The supervisor and another manager then visited Mendoza to discuss the situation. Mendoza told them he had many complaints about Fattaleh, including that

Fattaleh was very loud, he disrupted city hall and the ability of city employees to work, and he was “anti-government.”

In January 2013, before he knew about his supervisor’s meeting with Mendoza, Fattaleh filed an administrative complaint with the DFEH alleging the County had subjected him to unlawful discrimination, harassment, and retaliation throughout his employment based on his ancestry, race, and national origin. A few weeks later, Fattaleh filed this lawsuit against the County alleging claims for discrimination, hostile work environment, failure to prevent hostile work environment, retaliation, and workplace violence.

Shortly after Fattaleh filed this lawsuit, the County informed him it would conduct an investigatory hearing about Mendoza’s recent complaints. That hearing resulted in the County issuing Fattaleh a formal letter of reprimand, dated June 2013, that described not only Mendoza’s recent complaints about Fattaleh, but also the 2007 complaint by the Huntington Beach food facility manager, the 2011 complaint by Mendoza and the city councilwoman, and the 2011 complaint by Starbucks. Based on these complaints, the County admonished Fattaleh that it could suspend or terminate him if he did not improve his interactions with the public and facility operators. The County hearing officer also recommended transferring Fattaleh to another inspection district that did not include Los Alamitos. Fattaleh remains a County employee and he has not been transferred yet because he administratively appealed the reprimand and the County’s proceedings are ongoing.

After receiving the letter of reprimand, Fattaleh amended his complaint to include a claim alleging the County reprimanded him in retaliation for his DFEH complaint and this lawsuit. The County sought summary judgment on all of Fattaleh’s claims, arguing the claims were time barred, Fattaleh could not establish a prima facie case on any of his claims, and the County had a legitimate, nonretaliatory and

nondiscriminatory reason for reprimanding Fattaleh. The trial court agreed and granted the County's motion on all causes of action.

Fattaleh timely appealed to challenge the trial court's ruling on the retaliation claim only; he does not challenge the court's ruling on any other cause of action. The court granted the County's motion on the retaliation claim on the ground the County established a legitimate, nonretaliatory basis for reprimanding Fattaleh—the numerous complaints it received from the public and facility operators about his conduct—and Fattaleh failed to present evidence establishing a triable issue on whether that stated reason was a pretext for retaliation.

II

DISCUSSION

A. *Governing Legal Principles on Unlawful Employment Retaliation and Summary Judgment Motions*

Under the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.; FEHA), it is an unlawful employment practice for an employer to retaliate against an employee because the employee opposed any employment practice the FEHA prohibits or because the employee “has filed a complaint, testified, or assisted in any proceeding under [the FEHA].” (Gov. Code, § 12940, subd. (h).) Like FEHA discrimination claims, FEHA retaliation claims may be established through either direct or circumstantial evidence. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 69 (*Morgan*); see *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 140 (*Mokler*).)

Direct evidence is evidence that, if believed, establishes the employer's retaliatory motive or intent without inference or presumption. (*Morgan, supra*, 88 Cal.App.4th at p. 67.) When an employee offers direct evidence of retaliation that is believed by the trier of fact, the employer can avoid liability only by proving it would

have subjected the employee to the same adverse employment action without reference to the retaliatory motive. (*Id.* at pp. 67-68; *Mokler, supra*, 157 Cal.App.4th at p. 140.)

Recognizing direct evidence of an employer's retaliatory intent is rare, California courts have adopted the three-stage, burden-shifting test the United States Supreme Court established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*) for trying retaliation claims based on circumstantial evidence. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042 (*Yanowitz*); *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 860 (*Serri*).) “[Through] successive steps of increasingly narrow focus, the test allows [retaliation] to be inferred from facts that create a reasonable likelihood of [a retaliatory intent] and are not satisfactorily explained.” (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 159 (*Wills*).)

“At trial, under the first step of the *McDonnell Douglas* framework, the plaintiff may raise a presumption of [retaliation] by presenting a ‘prima facie case.’” (*Serri, supra*, 226 Cal.App.4th at p. 860; see *Yanowitz, supra*, 36 Cal.4th at p. 1042.) “[T]o establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a ‘protected activity,’ (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer’s action.” (*Yanowitz, supra*, at p. 1042; see *Mokler, supra*, 157 Cal.App.4th at p. 138.)

Although the employee’s burden at this initial stage is not onerous, he or she at least must show actions by the employer from which it may be inferred, if the employer fails to explain the actions, that it is more likely than not that the employer subjected the employee to an adverse employment action in retaliation for engaging in protected activity. (See *Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 965 (*Swanson*); *Wills, supra*, 195 Cal.App.4th at p. 159.) A satisfactory prima facie showing by the employee gives rise to a presumption of retaliation that, if not answered by the employer, is mandatory and requires judgment for

the employee. (*Yanowitz, supra*, 36 Cal.4th at p. 1042; see *Serri, supra*, 226 Cal.App.4th at p. 860; *Swanson*, at p. 965.)

In the second stage, the burden shifts to the employer to rebut the presumption by producing evidence sufficient to raise a genuine issue of fact and to support a finding the adverse employment action was taken for a legitimate, nonretaliatory reason. (*Yanowitz, supra*, 36 Cal.4th at p. 1042; *Swanson, supra*, 232 Cal.App.4th at p. 965.) The employer's burden at this stage also is not onerous (*Swanson*, at p. 965), and the employer does not take on a burden of persuasion (*Morgan, supra*, 88 Cal.App.4th at p. 68). "If the employer produces substantial evidence of a legitimate, [nonretaliatory] reason for the adverse employment action, the presumption of [retaliation] created by the prima facie case "simply drops out of the picture" [citation] and the burden shifts back to the employee to prove intentional [retaliation]." (*Ibid.*)

In the final stage, the employee may establish intentional retaliation either directly by persuading the court that a retaliatory reason more likely motivated the employer, or indirectly by showing the employer's stated explanation is pretextual or unworthy of credence. (*Batarse v. Service Employees Internat. Union, Local 1000* (2012) 209 Cal.App.4th 820, 834 (*Batarse*).) "'Circumstantial evidence of "'pretense' must be 'specific' and 'substantial' in order to create a triable issue with respect to whether the employer intended to [retaliate]." [Citations.] With direct evidence of pretext, "'a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial.'"" (*Ibid.*)

The *McDonnell Douglas* framework was developed for use in establishing intentional discrimination or retaliation at trial, and therefore we must alter the sequential framework on a summary judgment motion because summary judgment law places the initial burden on a moving party defendant to show the plaintiff's claim lacks merit by either negating an essential element of the claim or establishing a complete defense to the claim. (*Serri, supra*, 226 Cal.App.4th at p. 861; *Swanson, supra*, 232 Cal.App.4th at

pp. 965-966.) Thus, when an employer defendant seeks summary judgment on a retaliation claim, the employer “has the initial burden to present admissible evidence showing either that one or more elements of plaintiff’s prima facie case is lacking or that the adverse employment action was based upon legitimate, [nonretaliatory] factors.” (Serri, at p. 861; Swanson, at p. 966.) When the employer meets that burden by establishing a legitimate, nonretaliatory reason for its decision, the burden shifts to the employee to establish a triable issue on whether that reason was a pretext for retaliation. (Yanowitz, *supra*, 36 Cal.4th at p. 1061; Serri, at p. 861; Batarse, *supra*, 209 Cal.App.4th at p. 834.)

To meet that burden, the employee must produce “substantial evidence” that both shows the employer’s stated reasons for its actions were untrue and from which a reasonable trier of fact could conclude the employer engaged in unlawful retaliation. (Serri, *supra*, 226 Cal.App.4th at p. 861; *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1529 (*McGrory*)). “Logically, disbelief of an [e]mployer’s stated reason for [an adverse employment action] gives rise to a compelling inference that the [e]mployer had a different, unstated motivation, but it does not, without more, reasonably give rise to an inference that the motivation was a prohibited one.” (*McGrory*, at pp. 1531-1532.) “Proof that the employer’s proffered reasons are unworthy of credence may “considerably assist” a circumstantial case of [retaliation], because it suggests the employer had cause to hide its true reasons. [Citation.] Still, there must be evidence supporting a rational inference that *intentional [retaliation]* . . . was the true cause of the employer’s actions.” (*Id.* at p. 1531.)

Accordingly, “[a]n employee in this situation can not “simply show the employer’s decision was wrong, mistaken, or unwise. Rather, the employee “must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them ‘unworthy of credence,’ [citation], and

hence infer ‘that the employer did not act for the [. . . asserted nonretaliatory] reasons.’” (Batarese, *supra*, 209 Cal.App.4th at p. 834.) “[T]he inference must be a reasonable conclusion from the evidence and cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork.” (*McRae v. Department of Corrections & Rehabilitation* (2006) 142 Cal.App.4th 377, 389 (*McRae*)). “The central issue is and should remain whether the evidence as a whole supports a reasoned inference that the challenged action was the product of discriminatory or retaliatory animus.” (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 715.)

In this context, the Supreme Court has emphasized that “‘an employer is entitled to summary judgment if, considering the employer’s innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer’s actual motive was [retaliatory].’ [Citation.] It is not sufficient for an employee to make a bare prima facie showing or to simply deny the credibility of the employer’s witnesses or to speculate as to [retaliatory] motive. [Citations.] Rather it is incumbent upon the employee to produce ‘substantial responsive evidence’ demonstrating the existence of a material triable controversy as to pretext or [retaliatory motive] on the part of the employer.” (*Serri, supra*, 226 Cal.App.4th at pp. 861-862.)

“We review the trial court’s decision to grant summary judgment de novo. We are not bound by the trial court’s stated rationale, but independently determine whether the record supports the trial court’s conclusion that the plaintiff’s [retaliation] claim failed as a matter of law.” (*Wills, supra*, 195 Cal.App.4th at p. 161.) “‘In the summary judgment context, . . . the evidence must be incapable of supporting a judgment for the losing party in order to validate the summary judgment.’” [Citation.] “‘Thus even though it may appear that a trial court took a ‘reasonable’ view of the evidence, a summary judgment cannot properly be affirmed unless a contrary view would be unreasonable as a matter of law in the circumstances presented.’” (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 308.)

B. *The County Met Its Initial Summary Judgment Burden By Offering Evidence of a Legitimate, Nonretaliatory Reason for Reprimanding Fattaleh*

In seeking summary judgment on Fattaleh's retaliation claim, the County argued it met its initial burden by presenting evidence showing it had a legitimate, nonretaliatory reason for reprimanding Fattaleh, namely, the many complaints the County received about Fattaleh's conduct with the public and facility operators, including the multiple complaints by Mendoza.¹ We agree.

If they are nonretaliatory, an employer's true reasons for taking an adverse employment action against an employee need not necessarily have been wise or correct. "While the objective soundness of an employer's proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with a motive to [retaliate] illegally. Thus, "legitimate" reasons [citation] in this context are reasons that are facially unrelated to prohibited [retaliation], and which, if true, would thus preclude a finding of [retaliation].' [Citation.] Examples of legitimate reasons are a failure to meet performance standards [citation] or a loss of confidence in an employee [citation]."

(*Serri, supra*, 226 Cal.App.4th at p. 861, italics omitted.)

To support its motion, the County offered evidence showing it had received numerous complaints from the public and facility operators about their interactions with Fattaleh, and that the County had conducted three separate investigatory hearings to examine some of those complaints. Specifically, the County offered Fattaleh's own deposition testimony describing the 2007 complaint from the Huntington Beach food

¹ The County's summary judgment motion also attacked Fattaleh's retaliation claim on the ground he could not establish a prima facie case because the reprimand did not constitute an adverse employment action. The trial court disagreed and concluded a triable issue of fact existed on whether the reprimand amounted to an adverse employment action. The County contends the trial court erred in reaching that conclusion, but we need not decide that question because we conclude the County was entitled to summary judgment based on its stated nonretaliatory reasons for reprimanding Fattaleh.

facility manager, the 2011 complaint from Mendoza and the Los Alamitos City Councilwoman about the food truck event, Mendoza's 2012 complaint about Fattaleh disrupting business at the Los Alamitos City Hall, and the County's investigation and response to each of those complaints. The County also offered the December 2011 memorandum of expectations it sent to Fattaleh, which described the complaint from the Starbucks regional manager requesting that Fattaleh no longer conduct inspections at any Starbucks location, identified four additional facilities that requested Fattaleh no longer conduct their inspections, explained Fattaleh's lengthy history of public complaints made him the inspector who received the most complaints, and documented the County's repeated admonitions that Fattaleh's performance did not meet the County's standards and he needed to improve his interpersonal skills.

This evidence satisfied the County's initial burden because it shows the County reprimanded Fattaleh and recommended his transfer to another district that did not include Los Alamitos for reasons that were unrelated to his DFEH complaint and this lawsuit. Fattaleh does not dispute this evidence satisfied the County's initial burden and therefore shifted the burden to Fattaleh to present evidence showing these complaints were merely a pretext for the retaliation.

C. *Fattaleh Failed to Establish a Triable Issue of Fact on Pretext*

Fattaleh contends he established a triable issue of fact under the *McDonnell Douglas* framework by presenting evidence showing the County's stated reasons for formally reprimanding him were a pretext for retaliation. As evidence of pretext, Fattaleh points to (1) the temporal proximity between his protected activities of filing a DFEH complaint and this lawsuit in January and February 2013, and the County's adverse employment action of formally reprimanding him in June 2013, and (2) the County's heightened response to Mendoza's December 2012 complaint in comparison to the County's previous response to complaints about Fattaleh's conduct. This evidence

fails to create a triable issue because it does not support a reasonable inference the County's true motivation in reprimanding Fattaleh was to retaliate against him for filing the DFEH complaint and this lawsuit.

California courts repeatedly have held "that temporal proximity, although sufficient to shift the burden to the employer to articulate a [nonretaliatory] reason for the adverse employment action, does not, without more, suffice also to satisfy the secondary burden borne by the employee to show a triable issue of fact on whether the employer's articulated reason was untrue and pretextual." (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1112 (*Loggins*); see *Arteaga v. Brinks, Inc.* (2008) 163 Cal.App.4th 327, 353 (*Arteaga*); *McRae, supra*, 142 Cal.App.4th at p. 388.) Temporal proximity therefore is one factor that may be considered, but additional substantial evidence is required to establish a triable issue regarding pretext. (*Loggins*, at p. 1113.)

To provide that additional evidence, Fattaleh points to what he characterizes as the County's "disproportionate, heightened response" to Mendoza's most recent complaint. According to Fattaleh, the evidence shows the County received several complaints about his conduct over the years, and in response to each complaint, the County either took no action or convened an investigatory hearing to examine the complaint. After each hearing, however, the County simply issued a memorandum of expectations explaining how Fattaleh failed to comply with the County's policies and how the County expected him to conduct himself in the future. The County did not formally reprimand, warn, or punish Fattaleh based on any of these complaints.

In contrast, based on Fattaleh's December 2012 encounter with Mendoza, the County convened an investigatory hearing and then formally reprimanded Fattaleh by warning him that it could suspend or terminate him if he did not improve his behavior and also recommending his transfer to another inspection district that did not require him to interact with Mendoza. According to Fattaleh, this most recent encounter was nothing

more than “an innocuous and unfortunate misunderstanding” that arose from a joke he made about Mendoza’s tie and for which he quickly apologized. Fattaleh contends this encounter with Mendoza was less serious than other incidents that prompted the earlier complaints. In Fattaleh’s view, the formal reprimand therefore was unwarranted, and following closely on the heels of his DFEH complaint and this lawsuit, provides substantial circumstantial evidence that the County’s stated reasons for the reprimand were a pretext for retaliation based on those protected activities.

Fattaleh contends that conclusion is compelled by the Supreme Court’s *Yanowitz* opinion. We disagree because Fattaleh failed to produce any evidence showing either that he was similarly situated to the employee in *Yanowitz* or that the County’s conduct was analogous to the employer’s conduct in that case.

In *Yanowitz*, the employee was a longtime regional sales manager for a prominent cosmetic and fragrance company. (*Yanowitz, supra*, 36 Cal.4th at pp. 1035, 1037.) For a decade, the employee received nothing but favorable reviews that rated her performance as “‘Above Expectation’” or sometimes “‘Outstanding,’” even though the reviews also criticized her “‘listening’ and ‘communication’ skills.” (*Id.* at p. 1037.) For 1996, the employer named the employee the regional sales manager of the year, and in 1996 and 1997, the employee received higher bonuses than all other regional sales managers. In June 1997, her supervisor wrote a memorandum to the human resources director complimenting the employee for doing “‘a terrific job as a regional manager,’” but also criticizing her listening skills and “‘negative’ attitude.” In addition, the memorandum documented several complaints the company had received from retailers about the employee’s attitude. (*Id.* at pp. 1037-1038.)

In the fall of 1997, the employee conducted a store tour with the general manager for her entire division. After the tour, the general manager instructed the employee to fire a “dark-skinned female sales associate” because the manager did not find the associate to be “sufficiently physically attractive.” (*Yanowitz, supra*, 36 Cal.4th

at p. 1038.) The employee did not fire the sales associate, and on a later visit to the same store the general manager again instructed the employee to fire the sales associate. The employee asked for an adequate justification for firing the sales associate, but the general manager provided none. On several later occasions, the general manager asked whether the employee had fired the sales associate, and each time the employee said no because the general manager had not provided an adequate justification. (*Ibid.*)

Shortly after the employee's final refusal to fire the sales associate, her supervisor began actively soliciting negative information about the employee from her subordinates. Over the next few months, her supervisor also called her in for several meetings and wrote numerous memoranda criticizing her performance and threatening to terminate her if she did not improve. (*Yanowitz, supra*, 36 Cal.4th at pp. 1039-1040.) During one meeting with other sales managers and the employee's staff present, the supervisor screamed at the employee that she "could not get it right." (*Id.* at p. 1039.) During this period, the employer also received additional complaints about the employee from a few retailers. After a few months of this treatment, the employee went on stress disability leave, and the company replaced her while she was out. (*Id.* at pp. 1039-1040.)

The employee sued claiming the employer retaliated against her for refusing to fire the sales associate as the general manager had instructed. The employer moved for summary judgment, arguing its adverse actions against the employee were based on legitimate, nonretaliatory reasons, namely, the employee's poor listening skills and attitude, and the complaints it received from some retailers. The trial court granted the employer's motion, but the Court of Appeal reversed because it concluded a triable issue existed on whether the employer's stated reason was a pretext for retaliation. (*Yanowitz, supra*, 36 Cal.4th at pp. 1040-1042.) The Supreme Court agreed, concluding "the record reveals triable issues of fact as to whether [the employer's] heightened response to [the employee's] allegedly poor performance—after she refused to follow

[the general manager's] directive—was retaliation for her protected activity under the FEHA.” (*Id.* at p. 1062.)

Yanowitz explained the evidence regarding the employer's criticism of the employee and the retailer complaints did not support the trial court's summary judgment because the evidence also showed the employee had been subject to the same criticisms and complaints before she refused to fire the sales associate, and in those instances the employee still received excellent overall performance evaluations, was named regional sales manager of the year, and received the highest bonus for two consecutive years. Moreover, the evidence showed the employee's supervisor solicited negative information about the employee from her subordinates only after the employee refused to fire the sales associate. *Yanowitz* determined that solicitation of negative information “strongly suggests the possibility that her employer was engaged in a search for a pretextual basis for discipline, which in turn suggests that the subsequent discipline imposed was for purposes of retaliation.” (*Yanowitz, supra*, 36 Cal.4th at pp. 1061-1062.)

The sole authority *Yanowitz* cited to support its conclusion was a United States Court of Appeals decision, *Hairston v. The Gainesville Sun Publishing Co.* (11th Cir. 1993) 9 F.3d 913, 921 (*Hairston*), which *Yanowitz* summarized as follows: “[R]eversing summary judgment on the ground of pretext and finding that when the plaintiff presented evidence of above average performance evaluations before the filing of a complaint, and unfavorable performance evaluations immediately before and after the filing of a complaint, incidents of increased scrutiny and harassment bear on the pretext issue.” (*Yanowitz, supra*, 36 Cal.4th at p. 1062.)

Here, Fattaleh failed to present any evidence similar to what the employees presented in *Yanowitz* or *Hairston*. He did not present any of his performance reviews nor did he claim he received excellent or even above average reviews before he engaged in his protected activities. Rather, the December 2011 memorandum of expectations he received *before* engaging in his protected activities revealed Fattaleh “had ongoing issues

in each [of the last five] year[s] with [his] professionalism and appropriateness in working with operators,” he “had ongoing issues with [his] knowledge and application of food laws and regulations,” his most recent performance review noted he was “not meeting performance objectives” regarding his interpersonal skills, and he “continue[d] to receive more complaints than any other inspector.” Other evidence confirmed the County repeatedly received complaints from operators about Fattaleh’s conduct.

Fattaleh also did not present any evidence suggesting the County was soliciting negative information about him to use as a pretext for retaliation. Instead, the complaints the County received about Fattaleh originated with the operators after either the operators or Fattaleh brought a troublesome encounter to the County’s attention. Moreover, Fattaleh’s characterization of his most recent encounter with Mendoza as merely “an innocuous and unfortunate misunderstanding” about Mendoza’s tie flatly ignores that Mendoza complained about Fattaleh’s disruption of the other employees at city hall, not his interaction with Mendoza.

As explained above, to defeat the County’s motion Fattaleh was required to present substantial evidence from which a reasonable trier of fact could infer not only that the County’s stated reasons for reprimanding him were untrue or unworthy of credence, but also that unlawful retaliation was the true reason for the County’s actions. (*Serri*, *supra*, 226 Cal.App.4th at p. 861; *McGrory*, *supra*, 212 Cal.App.4th at p. 1529.) Fattaleh’s evidence merely established a history of complaints from the public and substandard performance reviews, the County repeatedly gave Fattaleh an opportunity to improve his performance, Fattaleh’s failed to do so, and the County responded to the most recent complaint by warning Fattaleh it could suspend or terminate him if he did not improve and recommending his transfer to another inspection district where he did not have to interact with Mendoza, the person who complained about him multiple times.²

² In the trial court, Fattaleh presented a declaration from his union representative who opined the County retaliated against Fattaleh because it treated him

Nothing in this evidence supports an inference the County retaliated against Fattaleh for filing his DFEH complaint or this lawsuit. If it did, an employer never could increase the severity of its response to a string of complaints about an employee without giving rise to an inference the increased response was in retaliation for recent protected activity. That is not the law. The only evidence Fattaleh cited that supports any possible inference of pretext or retaliation was the temporal proximity between his protected activities and the County's adverse employment action, but as explained above, temporal proximity alone is not sufficient to establish a triable issue on pretext. (*Arteaga, supra*, 163 Cal.App.4th at p. 353; *Loggins, supra*, 151 Cal.App.4th at p. 1112; *McRae, supra*, 142 Cal.App.4th at p. 388.) The trial court therefore properly granted the County's motion.

III

DISPOSITION

The judgment is affirmed. The County shall recover its costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.

more harshly than other employees. The trial court, however, sustained the County's evidentiary objections to the declaration on a variety of grounds. Fattaleh does not attack the trial court's evidentiary rulings on appeal and therefore forfeited any challenge the trial court erred in excluding that evidence. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1074.)